

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

### **FACTUAL HISTORY**

On April 25, 2013 appellant, then a 39-year-old industrial worker, filed a traumatic injury claim (Form CA-1) alleging that on April 10, 2013 she sustained headaches, a stomachache, insomnia, and nervousness after “multiple M98 flash bang canisters detonated.”

By decision dated June 7, 2013, OWCP denied appellant’s claim as she did not establish an injury in the performance of duty. It found that she had not established that the April 10, 2013 incident occurred.

On July 2, 2013 appellant requested an oral hearing before an OWCP hearing representative. In a decision dated February 5, 2014, the hearing representative set aside the June 7, 2013 decision. She found that appellant had established that she was performing her job duties when a canister ignited causing explosions. The hearing representative instructed OWCP to refer appellant for a second opinion examination.

Following further development, by decision dated September 24, 2014, OWCP denied appellant’s claim after finding that the medical evidence failed to establish a diagnosed condition causally related to the accepted April 10, 2013 employment incident.

Appellant, on October 7, 2014, requested reconsideration and submitted additional factual and medical evidence.

By decision dated September 14, 2015, OWCP denied appellant’s request for reconsideration as she had not raised an argument or submitted evidence sufficient to warrant reopening her case for further merit review under section 8128(a).

On appeal appellant’s counsel argues that the medical evidence establishes that she sustained an emotional condition as a result of the compensable work factor.

### **LEGAL PRECEDENT**

FECA provides that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.<sup>2</sup> Section 10.607(a) of OWCP’s regulations requires that an application for reconsideration must be received within one year of the date of OWCP’s merit decision from which review is sought.<sup>3</sup> If a request for reconsideration is timely, OWCP will reopen a case for merit review under section 8128(a) of FECA if the claimant: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by

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<sup>2</sup> *Id.* at § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.607(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

OWCP.<sup>4</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>5</sup>

OWCP's procedures provide:

"When a reconsideration decision is delayed beyond 90 days and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, OWCP should conduct a merit review. That is, the basis of the original decision and any new evidence should be considered and, if there is no basis to change the original decision, an order denying modification (rather than denying the application for review) should be prepared. There is no obligation to conduct a merit review on insufficient evidence if the maximum 180-day time limit for requesting review by the Board will have expired within the 90-day period following OWCP's receipt of the claimant's reconsideration request."<sup>6</sup>

### ANALYSIS

Appellant filed a traumatic injury claim alleging that she sustained headaches, a stomachache, insomnia, and nervousness on April 10, 2013 after M98 flash bang canisters detonated. OWCP denied her claim on June 7, 2013. Appellant requested an oral hearing. By decision dated February 5, 2014, an OWCP hearing representative accepted the employment incident and remanded the case for further development of the medical evidence. In a decision dated September 24, 2014, OWCP found that the medical evidence failed to establish that appellant had sustained a stress-related condition as a result of the compensable work factor.

On October 7, 2014 OWCP received appellant's timely request for reconsideration of its September 24, 2014 decision. It issued a decision denying merit review of her request for reconsideration on September 14, 2015, more than 11 months after receiving the request. The Board finds that OWCP's delay of more than 11 months in issuing a decision on appellant's reconsideration request effectively precluded her from appealing the most recent merit decision to the Board.<sup>7</sup> Had OWCP acted upon her request within 90 days, she would have been able to seek review of its September 24, 2014 merit decision by the Board. The Board will thus remand the case for OWCP to issue an appropriate decision on the merits of the case in order to preserve appellant's appeal rights.

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<sup>4</sup> 20 C.F.R. § 10.606(b)(3).

<sup>5</sup> *Id.* at § 10.608(b).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7(a) (October 2011); *M.D.*, Docket No. 13-1344 (issued November 7, 2013).

<sup>7</sup> *See* 20 C.F.R. §§ 501.2(c) and 501.3; *D.S.*, Docket No. 13-1802 (issued March 20, 2014).

### **CONCLUSION**

The Board finds that OWCP improperly denied appellant's request to reopen her case for further review of the merits under section 8128(a) as it did not issue a timely decision on her request for reconsideration.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 14, 2015 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 8, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board